United States -- Import Measures on Certain Products from the European Communities **(AB-2000-9)**

Appellant Submission of the United States
Executive Summary

September 27, 2000

1. The United States appeals four of the Panel's findings: (1) the Panel's findings with respect to GATT 1994 Article II:1(a) and (b), first sentence, which are based on the erroneous conclusion that the WTO-consistency of an enforcement measure is based on that of the measure enforced; (2) the Panel's finding with respect to DSU Article 23.2(a), because the European Communities ("EC") did not request or present arguments on this provision, and because the Panel incorrectly concluded that "determinations" within the meaning of Article 23.2(a) may be inferred from other actions; (3) the Panel's finding on DSU Article 3.7, also because the EC did not ask for or present arguments on this provision, and because the relevant provision in Article 3.7 does not include an obligation which can be breached; and (4) the Panel's finding on DSU Article 21.5, because the Panel based its findings on arguments not presented by the EC, and on its erroneous Article 23.2(a) finding.

2. The Panel's findings on GATT 1994 Article II:1(a) and (b), first sentence, are based on its erroneous conclusion that the WTO compatibility of bonding requirements "should be assessed together with the rights or obligations they aim at securing." The Panel concluded that because, in its view, the bonding requirements announced on March 3, 1999 were intended to enforce duties which, if applied, would exceed bound rates, the bonding requirements were inconsistent with GATT Article II:1(a) and (b), first sentence. This "guilt by association" approach is inconsistent with the Panel's responsibility to analyze a measure's WTO compatibility based on the measure itself, and not attribute to that measure the effects or breaches of another measure. The WTO Agreement makes clear that panels are not to collapse the analysis of an enforcement measure with the measure it is enforcing. For example, the Panel's analysis would deny effect to Article XX(d), which provides for a separate analysis of the measure enforced from the enforcement measure itself.

3. With regard to DSU Article 23.2(a), the Panel made a finding in the absence of so much as a request from the EC, let alone any argumentation. The Panel thus erroneously relieved the EC of its burden in this dispute and improperly made the EC's case on its behalf, contrary to the Appellate Body's finding in *Japan Varietal Testing*. The Panel's explanation that the EC's general references to "Article 23" and "Article 23, paragraphs 1 and 2," constituted such argumentation must be rejected, and would allow complaining parties to meet their burden without even identifying the specific obligation in question. Likewise, argumentation on a provision like Article 23.1, without any reference to Article 23.2(a), could not suffice to meet the EC's burden with respect to Article 23.2(a) merely because a breach of Article 23.2(a) would be one example of a breach of Article 23.1. Further, passing references to Article 23.2(a) in

contextual arguments relating to other provisions cannot suffice to meet the EC's burden. Likewise, general references in its factual discussion to "unilateral determinations" cannot meet the EC's burden of specifically demonstrating how the 3 March Measure was inconsistent with Article 23.2(a); panels may not scour the factual record to identify breaches not even requested by a party.

4. Even if the Appellate Body were to find that the Panel could properly examine Article 23.2(a), the Panel's finding should be reversed because the Panel improperly "implied a determination" within the meaning of Article 23.2(a). The ordinary meaning of "determination," as argued by the EC in another dispute, indicates that a decision on the WTO-consistency of another Member's measure must not only be final, but also be made as part of a formal legal proceeding. An "implied determination" is neither final, nor does it have any legal status. Moreover, if determinations may be implied, as the Panel suggests, from the very decision of a Member to resort to WTO dispute settlement proceedings, this would defeat the object and purpose of Article 23, and, based on the final clause of Article 23.2(a), would render the very decision to resort to WTO dispute settlement a breach of Article 23.2(a). Article 23.2(a) could not have been intended to hamper the ability of governments to make internal decisions on another Member's measure, nor to act on such decisions by invoking WTO dispute settlement procedures.

5. With respect to DSU Article 3.7, the Panel again made a finding not argued or requested by the EC. The EC in its response to U.S. comments on the interim report did not even dispute this. In addition, Article 3.7 provides guidance on the proper responses of a Member to the failure of another Member to implement the recommendations and rulings of the DSB; the provision cited by the Panel does not contain an obligation which the 3 March Measure could be said to have breached.

6. With respect to DSU Article 21.5, the Panel, after rejecting the claim presented by the EC, proceeded to make the EC's case based on arguments which the EC did not even present, in a situation very similar to that in *Japan Varietal Testing*. As it did in that dispute, the Appellate Body should reverse the Panel's finding, which relieved the complaining party of its burden. In addition, the Appellate Body should reverse the Panel's finding on Article 21.5 because it is based on its erroneous Article 23.2(a) finding.